

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 7
CAUSE NO. 49D07-1001-MI-003153

SQUAW CREEK COAL COMPANY,)
)
 Petitioner – Respondent Below,)
)
INDIANA DEPARTMENT OF)
NATURAL RESOURCES,)
)
 Respondent Below,)
)
 v.)
)
BIL MUSGRAVE,)
)
 Respondent – Claimant Below.)

FILED

(189) MAR 11 2011

Shabeta L. White

ORDER ON VERIFIED PETITION FOR JUDICIAL REVIEW

This matter comes before the Court on the Verified Petition for Judicial Review filed by Squaw Creek Coal Company (“SCCC”). The Petitioner asserts that the Final Order issued in the administrative proceedings below was wrongly decided which has caused injury to SCCC. The Indiana Department of Natural Resources (“DNR”) has also argued that the decision below was erroneous and contrary to law. Bil Musgrave (“Musgrave”) defends the decision by the administrative law judge (“ALJ”) in the proceeding below.

This Court, having considered the Verified Petition, Petitioners’ briefs, the response brief of Bil Musgrave, and the oral arguments by each party’s counsel, being duly advised, enters the following order.

PROCEDURAL BACKGROUND

1. SCCC’s “North Field” was opened for coal mining in 1965. (AR 02036). From 1965 to 1979, Alcoa disposed of wastes from its plant operation in the Squaw Creek Mine’s North

Field. *Id.*

2. The Surface Mining Control and Reclamation Act (“F-SMCRA”) was passed by the United States Congress in 1977. 30 USCA §§1201 (k). Indiana’s Surface Mining Control and Reclamation Act (“I-SMCRA”) program was approved by the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement, as of August 19, 1983. 30 CFR 914.10.

3. In March 1984, DNR issued Permit No. S-008 to SCCC for part of the North Field. (AR 00361). Mining in the North Field ended in 1998. (AR 00312).

4. DNR approved SCCC’s request for release of the three phases of bond for the requested areas on January 31, 2008. (AR 00359-00362)

5. On February 15, 2008, Musgrave filed a petition for administrative review of the DNR’s order granting bond releases. (AR 00012, ¶ 1)

6. On cross-motions for summary judgment, the ALJ issued her Findings of Fact and Conclusions of Law with Final Order on December 28, 2009 (“Final Order”). (AR 00012-00046)

7. The Final Order determined that the DNR had properly conducted a public hearing in connection with the bond release application for Permit No. S-008; upheld the DNR’s approval of SCCC’s application for Phase I bond release as to 49.39 acres and Phase II bond release as to 268.25 acres; but vacated the DNR’s approval of SCCC’s application for Phase III bond release as to 955.37 acres. (AR 00012-00046)

8. On January 22, 2010, SCCC timely filed its verified petition for judicial review with this Court pursuant to Ind. Code § 4-21.5-5. (Ct. Dkt.) The verified petition raised a single issue for review: whether the administrative law judge’s reversal of DNR’s approval of SCCC’s application for Phase III bond release was proper. (*Id.*)

STANDARD OF REVIEW

A trial court's review of an agency proceeding is not intended to be a trial *de novo*, but rather the court simply analyzes the record as a whole to determine whether the administrative findings are supported by substantial evidence. Ind. Code § 4-21.5-5-11; *Board of Trustees of the Pub. Employees' Retirement Fund of Ind. v. Miller*, 519 N.E.2d 732, 733 (Ind. 1988).

Indiana precedent uniformly agrees that during a judicial review proceeding the trial court sits as a court of appellate review. *Indiana Dep't of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100, 103 (Ind. 1993) ("a trial court acts as an appellate court when it reviews an administrative order"); *Bucko Constr. Co. v. Indiana Dep't of Transp.*, 850 N.E.2d 1008, 1017 (Ind. Ct. App. 2006) (trial court acts as an appellate court when it reviews an administrative order); *DenniStarr Environmental, Inc. v. Indiana Dep't of Environmental Management*, 741 N.E.2d 1284, 1290 (Ind. Ct. App. 2001) (same), *trans. denied*, 753 N.E.2d 13.

However, questions of law—such as the proper interpretation of a statute or a rule—remain the exclusive province of the courts. *Wilson v. Board of Indiana Employment Security Division*, 385 N.E.2d 438, 441 (Ind. 1979) (Indiana courts owe no deference to an administrative agency's determinations of law, and legal questions are reviewed by the courts *de novo*), *cert. denied*, 444 U.S. 874; *Prosser v. J.M. Corp.*, 629 N.E.2d 904, 907-08 (Ind. Ct. App. 1994). This Court evaluates determinations of law on appeal without deference to the ALJ's conclusions.

DISCUSSION

A. Collateral Estoppel

SCCC and DNR assert that DNR's jurisdiction—or lack thereof—over industrial wastes unrelated to coal mining was fully litigated and resolved against Musgrave in a prior administrative action. *Musgrave v. Indiana Dep't of Nat. Res.*, 10 CADDNAR 178 (2006)

(“*Musgrave I*”).¹ The ALJ held in *Musgrave I* that “the remediation of contamination resulting from alleged past toxic dumping ... is not within the jurisdiction of the Department, the Commission, or the administrative law judge.” *Musgrave I*, 10 CADDNAR at 186. (AR 00525)

In *Musgrave I*, Musgrave sought administrative review of the DNR’s decision to release the performance bond on portions of the S-009 permit area of the Squaw Creek Mine (the “South Field”). Like the present case, Musgrave argued that I-SMCRA mandated DNR’s consideration of the risk that plant waste materials disposed of in the North Field could adversely impact the South Field permit area. The ALJ presiding over *Musgrave I* disagreed and dismissed Musgrave’s petition with prejudice. *Musgrave I* correctly held that DNR, the Commission, and the ALJ have no jurisdiction over “contamination resulting from alleged past toxic dumping” and no authority to grant any relief associated with such contamination. *Id.* at 186. (AR 00525) SCCC argues that Musgrave’s claims in the present appeal should be barred by collateral estoppel and that the Final Order unlawfully ignored the prior ruling.

Collateral estoppel has three elements: (1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of issues; and (3) the party to be estopped was a party in the prior action. *Sims v. Scopelitis*, 797 N.E.2d 348, 351 (Ind. Ct. App. 2003). Furthermore, “In determining whether a second proceeding is barred by the adjudication of a previous administrative proceeding involves a determination as to whether both actions are supported by the same evidence.” *Dean and Marilyn Ray v. Lukis, et al.*, 12 CADDNAR 69 (2009) (citing *Bojrab v. John Carr Agency*, 597 N.E.2d 376, 378 (Ind. Ct. App. 1992)).

First, in *Musgrave I*, Musgrave challenged the release of the bond posted for Permit No. S-009, a completely different permit area from the S-008 permit area at issue here. In *Musgrave I*, the ALJ held that “the Department is without authority to deny bond release on Permit # S-009

¹ Exhibit J, Case Law Appendix in Support of SCCC Response (AR 00474-552).

as a result of activities that allegedly occurred within the permit area covered by Permit # S-008 . . .” The ALJ further held that “In the event it were appropriate for the Department to deny any bond release relating to the Musgraves’ complaint of toxic dumping and the resulting contamination it would have to be the bond related to Permit # S-008, not the bond posted on Permit # S-009. However, that issue is not presented for determination here.” *Musgrave I*, ¶ 38. Second, because two different parcels of land are at issue and each parcel has a separate reclamation permit, “it cannot reasonably be concluded that both actions could be supported by the same evidence.” *Id.*

The essence of Musgrave’s challenge here is whether SCCC and DNR complied with I-SMCRA, Ind. Code § 14-34 *et seq.*, and the regulations governing the release of a Phase III bond from the S-008 permit area. This issue was not litigated in *Musgrave I*. The ALJ correctly held that Musgrave is not collaterally estopped from litigating whether the bond for the Permit # S-008 was properly released by DNR despite the holding in *Musgrave I*.

B. DNR Has No Jurisdiction Over Non-Mining, Industrial Wastes

Musgrave argues that I-SMCRA’s bond release requirements apply to industrial plant waste materials. SCCC and DNR assert that the regulation and remediation of industrial plant waste is within the exclusive province of the Indiana Department of Environmental Management (“IDEM”).

The industrial plant waste at issue in this appeal originated at Alcoa’s Warrick Plant. From 1965 to 1979, certain waste streams from Alcoa’s Warrick Operations were deposited in areas within the Squaw Creek Mine’s North Field. (AR 02036) The disposal was completed in coordination with the Indiana State Board of Health (predecessor to the Indiana Department of Environmental Management). The industrial waste disposal occurred prior to July 29, 1982, the effective date of I-SMCRA and its implementing regulations. Public Hearing Report (January 31, 2008) at ¶¶ III, V.1-2. (AR 00360, 00362)

DNR, like all state agencies, has only limited powers. *Smith v. Thompson Constr. Co.*, 69 N.E.2d 16, 17 (Ind. 1946) (“Since the Board derives its authority from the statutes, it can do the things authorized by the Legislature *and beyond that it cannot legally go.*”) (emphasis added). “An administrative agency is a creature of the legislature. Its powers are strictly limited to its authorizing statute.” *Indiana Dep’t of Revenue v. Best Ever Co.’s, Inc.*, 495 N.E.2d 785, 787 (Ind. Ct. App. 1986). DNR has only those powers granted to it by statute and it may not usurp the powers of another sister agency. “It is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute” *Indiana State Bd. of Public Welfare v. Tioga Pines Living Center, Inc.*, 622 N.E.2d 935, 939 (Ind. 1993), *cert. denied*, 114 S.Ct. 1302 (1994), *citing Blue v. Beach*, 56 N.E. 89 (Ind. 1900).

IDEM is the state agency charged with addressing contamination associated with releases of hazardous substances. Ind. Code § 13-25-4 is the statute giving IDEM federal CERCLA authorization; Ind. Code § 13-13-5-1(2) states that IDEM is the designated solid waste agency for Indiana for the purpose of RCRA in effect as of January 1, 1982; and that it is (5) the state agency with responsibility concerning federal CERCLA. Ind. Code § 13-25-4-9 states that the Commissioner of IDEM may proceed in court by appropriate action to 1) compel a responsible person to undertake a removal or remedial action with respect to a release or threatened release of a hazardous substance from a facility or site in Indiana. These statutes give IDEM jurisdiction over issues arising from disposal of plant wastes anywhere in the state, regardless of whether the site in question was also used for another purpose, such as coal mining.

DNR is the state agency charged with addressing a mine operator’s fulfillment of the reclamation and bond release requirements of the I-SMCRA. *See* Ind. Code § 14-34-2-3; Ind. Code § 14-34-6 *et seq.* These statutes are specifically limited and applicable only to a “person who engages in surface coal mining operations.” Ind. Code § 14-34-1-1. The Final Order is in

excess of the statutory jurisdiction granted to DNR because it requires DNR to consider data not associated with surface coal mining operations and which is instead associated with contamination from plant waste disposal. Such an evaluation is not within DNR's purview, regardless of the fact that disposal of the wastes took place in a surface coal mine.

The record shows that IDEM is exercising jurisdiction over the hazardous substances/plant wastes disposed of in the mine. (See AR 00692-00702; AR 00211-00217) This is not a situation where one agency must step in because the other has not done its job. IDEM has overseen many investigations at the Squaw Creek Mine, and nothing in the record indicates any lack of involvement by IDEM. The facts are that this land was used for two purposes-both surface mining and waste disposal. Both DNR and IDEM have concurrent jurisdiction, but focus on different statutory mandates. However, concurrent jurisdiction does not require, and in fact, it precludes DNR from making decisions with regard to issues that are within IDEM's purview.

The administrative agency tasked with enforcing a statute is entitled to deference concerning its interpretation. *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000) ("interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight"); *Indiana Dep't of Env't'l Mgmt. v. Boone County Resource Recovery Systems, Inc.*, 803 N.E.2d 267, 273 (Ind. Ct. App. 2004) (quoting *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003)). In *Boone County*, the appellate court held, "[w]hen a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless that interpretation is inconsistent with the statute itself. When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency. When a court determines that an administrative agency's interpretation is reasonable, it should 'terminate its analysis' and not

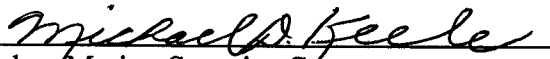
address the reasonableness of the other party's interpretation. Terminating the analysis recognizes 'the general policies of acknowledging the expertise of the agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations.'" *Id.* at 273. DNR is the agency tasked with determining when a bond release is appropriate and what issues should be included in making such determinations. Ind. Code §§ 14-34-6-7 – 16. The Final Order improperly expands the jurisdiction of DNR into areas which have always been under exclusive IDEM jurisdiction.

This Court finds that the statutory delegation of powers by the General Assembly to DNR and to IDEM to be unambiguous. Giving the statutory words their plain and ordinary meaning, this Court holds that DNR correctly interpreted its own statutorily imposed limitations so as to avoid a conflict with IDEM's statutory responsibilities for the regulation of industrial wastes. The Final Order improperly expands the jurisdiction of DNR into areas which have always been under exclusive IDEM jurisdiction. The statutory interpretation of the ALJ is overruled as a matter of law and DNR's statutory interpretation concerning its lack of jurisdiction over non-mining wastes is hereby affirmed.

ORDER

For the foregoing reasons, the Final Order is hereby reversed as a matter of law as to the Phase III bond release issue. This Court has determined that DNR has no jurisdiction over non-mining wastes in a bond release case. For these reasons, the Court finds it unnecessary to address the assertions by SCCC and DNR that the Final Order was procedurally flawed for failure to follow proper summary judgment procedure. This appeal is REMANDED to the agency for entry of judgment for SCCC and DNR consistent with this Order and for such other relief as is proper.

IT IS SO ORDERED in Indianapolis, Indiana, this 11TH day of March, 2011.


Judge, Marion Superior Court
Civil Division, Room No. 7

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